



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 457 OF 2014**

**SAID MUTUGA MTISO.....CLAIMANT**

**VS**

**KENETH LIVEHA t/a**

**SACUL ENTERPRISES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues and compensation for unfair termination of the claimant's employment contract by the respondent in March 2014. The claim is contained in the Amended Claim filed on 21.7.2015 and it includes:-

- (a) One month salary in lieu of notice being kshs.20,900**
- (b) Refund of unremitted NSSF and NHIF deductions amounting to Kshs. 45,600**
- (c) Compensation for unfair termination amounting to Kshs. 250,800.**

2. The respondent has denied ever terminating the services of the claimant and blames him for the termination of his own employment through his personal interests which caused him to be barred from accessing his work place by Bamburi Cement Ltd, who had contracted the respondent to provide labour.

3. The suit partially proceeded by oral evidence before the parties amended their pleadings and agreed to dispense with calling witness and instead proceeded by way of written submissions on the basis of the pleadings, witness statements and documentary evidence filed.

**Analysis and Determination**

4. After careful perusal and consideration of the pleadings, witness statements, documentary evidence and the submissions filed, it is clear that the claimant was employed by the respondent from 22.4.2010 as a Technical Assistant and later rose to the rank of Supervisor according to the witness statement by Duncan Were the respondent's Operations Manager filed on 13.8.2015. There is also no dispute that on 15.1.2014 at around 4pm the claimant went to the offices of Bamburi Cement Ltd to request for a gift of a calendar after seeing his colleague Mr. Duncan Were with one. There is further no dispute that his conduct did not please the Management of the Bamburi Cement Ltd who had outsourced Labour from the respondent.

Lastly there is no dispute that as a result of the foregoing incidence, the claimant's Gate pass was withdrawn by Bamburi Cement Ltd and thereby the claimant was barred from accessing his work place. The issues for determination are:-

**(a) Whether the claimant's employment was unfairly terminated by the respondent in March 2014.**

**(b) Whether the reliefs sought should be granted.**

### **Unfair termination**

5. Under section 47(5) of the Employment Act (EA), the burden of proving unfair termination of employment lies with the employee. In this case the claimant has admitted that on 15.1.2014, he went to solicit for a gift of calendar from the Managers of Bamburi Cement Ltd but he was not given because the calendars were not available. That on the way out he meet Mr. Maganga, the Road Safety Coordinator for Bamburi Cement Ltd coming to his office. That shortly thereafter Mr. Maganga followed him and called him back to the office and asked him why he had entered his office when there was nobody. That the claimant denied any wrong doing and went away. That later while on his way home, his Gate-pass was confiscated pending investigations on the said incidence. That although after internal investigations he was not found to have committed any criminal offence, his Gate-pass was never returned to him and as such he could not access his work station.

6. After considering all the material presented to the court, it is evident to me that the reason for the claimant's inability to access his work place cannot be blamed on the respondent. It is the claimant who authored his own misfortune by going beyond his normal course of employment by entering into the offices of Management of Bamburi Cement Ltd without prior authority. The reason for going to the said offices was the claimant's jealous and the unquenchable desire for the gift of a New Year calendar after seeing his colleague Mr. Duncan Were with one. Consequently I find and hold that the claimant has failed to prove on a balance of probability that the respondent terminated his services and that she did so unfairly.

### **Reliefs**

7. In view of the foregoing finding that the respondent never terminated the services of the claimant, the claims for salary in lieu of notice and compensation for unfair termination are dismissed. I have however considered the evidence presented to the court including the salary vouchers and NSSF statement and made a finding of fact that the respondent deducted from the claimant's salary, NSSF and NHIF contributions but failed to remit the same to the relevant Authority. Although the claimant pleaded that the total monthly deductions was Kshs. 950, the truth is that he was deducted Kshs. 200 for NSSF and Kshs. 350 for NHIF which totals to Kshs. 530 per month. He worked from April 2010 to April 2014 which is a total of 4 years or 48 months. Consequently the total unremitted NSSF and NHIF deductions is Kshs. 26,400 of which I order and direct the respondent to refund to the claimant forthwith. I also order the respondent to issue the claimant with a Certificate of Service as provided for under section 51 of the Employment Act.

### **Disposition**

8. For the reasons stated above, I enter judgment for the claimant for the sum of Kshs. 26,400 plus half costs and interest. The claimant will also have Certificate of Service.

**Signed, dated and delivered this 7<sup>th</sup> day of October, 2016.**

**ONESMUS MAKAU**

**JUDGE**